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No. 96-1557

# In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN E. CALHOON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

## QUESTIONS PRESENTED

1. Whether the district court's failure to submit the issue of materiality to the jury warranted reversal under the plain-error rule (Fed. R. Crim. P. 52(b)).

2. Whether petitioner's submission of materially false claims for Medicare reimbursement violated 18 U.S.C. 1001 and 1341 irrespective of any entitlement he might have had to reimbursement if he had submitted truthful claims.

3. Whether petitioner was properly convicted of concealing facts material to his claims for reimbursement.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 97 F.3d 518.

### JURISDICTION

The judgment of the court of appeals was entered on October 16, 1996. A petition for rehearing was denied on December 30, 1996. Pet. App. B1-B2. The petition for a writ of certiorari was filed on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on eight counts of making false statements to the Department of Health and Human Services, in violation of 18 U.S.C. 1001; and on three counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to 15 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A32.

1. During the period relevant to this case, petitioner was employed by Charter Medical Corporation (CMC), a national hospital chain. Petitioner was responsible for obtaining Medicare reimbursement for a group of CMC psychiatric hospitals. To obtain such reimbursement, CMC filed cost reports with private insurance companies that were under contract with the Department of Health and Human Services (HHS) to help administer the Medicare program. Those private insurance companies served as fiscal intermediaries between the hospitals and HHS. They made periodic payments to CMC throughout the year to satisfy the hospitals' cash requirements. At the end of each fiscal year, CMC filed annual cost reports, delineating the costs that each hospital had incurred. Using those reports, the intermediaries determined the annual amount of Medicare reimbursement due to each CMC hospital under various government regulations and guidelines. The intermediaries then either paid CMC an amount that was due or billed CMC for excessive interim payments. Pet. App. A2-A4.

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[1] The government dismissed two counts under Section 1001, and the jury acquitted petitioner on a third such count. Pet. App. A2.

Under industry practice, a health-care provider's cost statements often include items that the provider claims to be subject to reimbursement but that it knows will likely be disputed by an insurance intermediary. In those circumstances, the provider lists those items as presumptively nonreimbursable and files them "under protest." Because of the volume of cost reports they receive, intermediaries often face difficult resource-allocation decisions in designating items for particular scrutiny, such as a full field audit. In making those decisions, intermediaries necessarily rely in large measure on the veracity of the information supplied by the health-care provider. See Pet. App. A4, A23.

2. Petitioner managed one of two sections at CMC responsible for filing cost reports with the insurance-company intermediaries. Pet. App. A2-A3. His convictions rested on three categories of expenses for which he had sought Medicare reimbursement. First, petitioner sought reimbursement for "royalty fees" that individual CMC hospitals had paid to a separate CMC subsidiary for the right to use the "Charter" name; in so doing, he concealed the fact that the hospitals' "expenses" were payments made to a related corporate entity. See *id.* at A7-A15. Second, petitioner sought reimbursement for interest payments associated with certain other transactions conducted within the CMC corporate family; there too, petitioner failed to disclose that the payments were made to a related company. *Id.* at A7-A8, A15-A17. Finally, petitioner sought reimbursement for CMC's advertising costs—only some of which were reimbursable under Medicare—by falsely characterizing those costs as "outreach" rather than as advertising. *Id.* at A17-A19. Petitioner had told one subordinate at CMC that

"if just one intermediary misses an adjustment because it is called outreach, these general ledgers [on which petitioner had made those mischaracterizations] have served their purpose." *Id.* at A19.

3. At trial, the district court instructed the jury that petitioner's alleged false statements were material as a matter of law. Petitioner raised no objection to that instruction. See Pet. 22. After petitioner was convicted, this Court decided *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which held that the element of materiality in a Section 1001 prosecution must be submitted to the jury.

On appeal, petitioner first contended that the evidence had been insufficient to prove that his reimbursement claims were false or fraudulent. The court of appeals noted that the government had failed to prove that the royalty fees and interest payments were nonreimbursable *per se*. Pet. App. A10-A13, A15-A17. With respect to those transactions, however, the court determined that petitioner's reimbursement claims were nonetheless false and fraudulent because he had concealed the common corporate ownership of the entities involved in the transactions, a fact that the Medicare regulations and cost report forms required him to disclose. *Id.* at A13-A17. Similarly, because the "outreach" costs were in fact disguised advertising costs, and because petitioner knew that using a different term would conceal the true nature of those costs, the court determined that those claims were also false. *Id.* at A18-A19.

The court of appeals then turned to the issue of materiality. The court determined that, under *Gaudin*, the district court's failure to submit the issue of materiality to the jury was error. Nonetheless, applying the plain-error standard set forth in

Federal Rule of Criminal Procedure 52(b), see generally *United States* v. *Olano*, 507 U.S. 725 (1993), the court held that the error did not require reversal, because "there is no reasonable argument that the statements at issue here were not material." Pet. App. A22. The court explained that "the intermediaries necessarily rely on the information provided in the cost report to make their reimbursability determinations," that "[t]he cost reports were sufficient to persuade the intermediary to authorize reimbursement without further investigation," and that those reports "therefore[] had the capacity to impair or pervert the functioning of a government agency by misleading the intermediaries." *Id.* at A23 (internal quotation marks omitted).

The court of appeals also rejected petitioner's claim that the standards for Medicare reimbursement are so vague that fraudulent claims for such reimbursement can never give rise to criminal liability. See Pet. App. A19-A21. The court explained that a false or fraudulent request for Medicare reimbursement is unlawful whether or not a truthful request would have stated a valid claim to reimbursement: "[W]hile it is true that a provider may submit claims for costs it knows to be presumptively nonreimbursable, it must do so openly and honestly, describing them accurately while challenging the presumption and seeking reimbursement. Nothing less is required if the Medicare reimbursement system is not to be turned into a cat and mouse game in which clever

providers could, with impunity, practice fraud on the government." *Id.* at A20.[2]

## ARGUMENT

1. Under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), decided after petitioner's trial, the district court's failure to instruct the jury on the issue of materiality with respect to the Section 1001 counts was error. Petitioner does not, however, directly challenge the court of appeals' factbound determination (see Pet. App. A22) that "there is no reasonable argument that the statements at issue here were not material." Instead, petitioner contends that the court of appeals should not have conducted any form of plain-error review because, in his view, a *Gaudin* error, even in the absence of an objection at trial, is a "structural error" that requires reversal whether or not it "affected the outcome." Pet. 23.

As petitioner recognizes (Pet. 24-25), a similar claim was presented in *Johnson* v. *United States*, No. 96-203, which this Court decided on May 12, 1997. In *Johnson*, the Court rejected that claim and held that, in the absence of a timely objection, a *Gaudin* error is subject to plain-error review under Rule 52(b) of the Federal Rules of Criminal Procedure. The Court therefore held that, contrary to petitioner's position here (see Pet. 22-25), such an error warrants the exercise of remedial discretion only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, slip op. 8 (internal quotation marks omitted). The Court determined that the defendant in *Johnson* had failed to establish

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[2] The court of appeals also rejected other challenges to petitioner's convictions and sentence; he does not renew those contentions here.

her entitlement to relief under that standard because the evidence on materiality was "overwhelming" and "essentially uncontroverted," and because the defendant had presented "no plausible argument" that the error had affected the verdict. Slip op. 8-9.

Although this petition presents no direct argument concerning any effect that the error in this case may have had on the verdict, petitioner did make such an argument below. See Pet. App. A21-A23. In that respect, petitioner's claim of plain error is arguably distinguishable from the claim rejected in *Johnson*. That decision does not cast doubt, however, on the validity of the court of appeals' judgment here; to the contrary, it supports it. The court of appeals (see *ibid.*) rejected petitioner's *Gaudin* claim because he had not demonstrated any reasonable possibility that a properly instructed jury would have failed to find that the materiality element was met. In particular, petitioner's false reimbursement requests easily satisfied the definition of materiality because they had "a natural tendency to influence, or w[ere] capable of influencing, the decision of the decision-making body to which [they were] addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988); see Pet. App. A22.

Although the court appeared to decide this case under the "substantial rights" component of plain-error analysis rather than under the "discretionary" component that was dispositive in *Johnson*, see Pet. App. A22; compare *Johnson*, slip op. 7-9, the court's inquiry into the effect of the *Gaudin* error on the verdict (see Pet. App. A22) is indistinguishable from the inquiry required as part of that discretionary analysis. See *Johnson*, slip op. 8-9. For that reason, a remand in light of *Johnson* is unnecessary. Nothing

in *Johnson* requires reversal of a conviction in the absence of a "plausible argument" (slip op. 9) that an instructional error, to which no objection was made at trial, did have some effect on the verdict.

2. Petitioner also contends (see Pet. 25-29) that an individual may never be prosecuted for filing false and fraudulent claims for Medicare reimbursement if the expenses claimed were actually incurred. Petitioner argues that, because eligibility for Medicare reimbursement is often a complex inquiry, such prosecutions would deprive Medicare claimants of fair notice of the legality of their conduct. That argument is without merit. Petitioner was prosecuted and convicted not (as he suggests) because he submitted requests for reimbursement to which his company may not have been entitled, but because, in submitting those requests, he distorted and fraudulently concealed facts material to the question of eligibility. Petitioner cites no case, and we are aware of none, holding that uncertainty about a claimant's underlying entitlement to reimbursement removes a fraudulent claim for such reimbursement from the scope of criminal liability. See *United States* v. *Meuli*, 8 F.3d 1481, 1485 (10th Cir. 1993) (under Section 1001, false statement is material if it "influenced the possibility that an * * * investigation would ensue"), cert. denied, 511 U.S. 1020 (1994); *United States* v. *McIntosh*, 655 F.2d 80, 83 (5th Cir. 1981) (similar), cert. denied, 455 U.S. 948 (1982); *United States* v. *Allard*, 926 F.2d 1237, 1242 (1st Cir. 1991) (under Section 1341, "[t]he relevant inquiry is whether there was an intent to mislead the victim by inducing an uninformed consent to part with money or property," not whether "the intended victim was actually defrauded"); cf. *United States* v. *Race*, 632

F.2d 1114 (4th Cir. 1980) (reversing conviction under Section 1001 because prosecution had not proven falsity of claim).

3. Finally, petitioner contends (Pet. 29-30) that, because his conviction on certain counts is based on a theory of concealment, and because (he alleges) the issue of concealment appeared neither in his indictment nor in the relevant portion of the jury instructions, he "stands convicted for something he was neither alleged nor proven to have done." As an initial matter, that claim is not properly before this Court, because petitioner did not raise it in the court of appeals until his petition for rehearing, and that court did not address it.

In any event, the indictment did charge that petitioner had "concealed the true nature of the expenses * * * for which [he] claimed reimbursement," Indictment, p. 4 (Count One, alleging violation of Section 1341), and the district court specifically instructed that "[a] statement or representation may * * * be false or fraudulent when it constitutes a half truth or effectively conceals a material fact with intent to defraud," Sept. 23 & 26, 1994 Tr. 70.[3] Thus, to the extent that petitioner contends that the jury was not properly instructed on the issue of concealment, his claim is incorrect. To the extent that he contends that he had no legal duty to disclose the facts that he concealed, cf. *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096-1097 (11th Cir. 1983), the court of appeals

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[3] Although the district court placed that instruction within a set of instructions relevant to Section 1341, it had earlier identified "false or fraudulent statement[s]" as the subject of an offense under Section 1001 as well. Sept. 23 & 26, 1994 Tr. 68-69.

correctly rejected that factbound claim. See Pet. App. A13-A21. Finally, to the extent that petitioner tacitly (and erroneously) claims an improper variance between the indictment and the proof at trial, he identifies no resulting prejudice and therefore no basis for reversal. See, *e.g.*, *United States* v. *Jones*, 913 F.2d 1552, 1560 (11th Cir. 1990) (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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